**Calendar No. 454**

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# HELPING FAMILIES DEFRAY ADOPTION COSTS, AND PROMOTING THE ADOPTION OF MINORITY CHILDREN

JUNE 24, 1996.—Ordered to be printed

Mr. MCCAIN, from the Committee on Indian Affairs, submitted the following

## REPORT

[To accompany H.R. 3286]

The Committee on Indian Affairs, to which was referred the bill (Title III of H.R. 3286), the Adoption Promotion and Stability Act of 1996, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

The Committee on Indian Affairs, to which was referred Title III of the bill (H.R. 3286) to help families defray adoption costs, and to promote the adoption of minority children, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

### PURPOSES

The purpose of H.R. 3286 is to help families defray adoption costs, and to promote the adoption of minority children.

### BACKGROUND ON INDIAN CHILD WELFARE POLICY

The Indian Child Welfare Act of 1978 (ICWA) was enacted by the Congress in response to growing concerns in the 1970's over the consequences of the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement. In particular, the Congress expressed concern over the inordinately high number of placements of Indian children into non-Indian homes and environments, concluding that "[t]he wholesale separation of Indian children from their families is perhaps the

most tragic and destructive aspect of American Indian life today."[1] Congressional oversight hearings in 1974, 1977 and 1978 documented many examples of this wholesale removal of Indian children from their families and homes. Studies conducted by the Association of American Indian Affairs (AAIA) prior to enactment of ICWA revealed that 25 to 35 percent of all Indian children had been separated from their families and placed into adoptive families, foster care, or other institutions.[2] In certain States, the problem of public and private agencies removing Indian children from their homes and placing them off the reservation in non-Indian homes was more widespread. For example, in Minnesota from 1971 through 1972 nearly one in every four Indian infants under the age of one year old was placed for adoption. Over this same period the adoption rate of Indian children was five times that of non-Indian children and approximately 90% of these Indian placements were in non-Indian homes.[3]

Several witnesses in hearings before the Senate and House Committees testified about the serious adjustment problems encountered by these Indian children as they reached adolescence and then later as they themselves became parents. Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified that:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.[4]

In recognition of the best interest of Indian children and the interest of Indian tribes in the welfare of their children, the Congress carefully crafted the ICWA to protect the important traditional role played by an Indian tribe and the extended family in child welfare. The result is that the ICWA creates a jurisdictional framework that balances the interest of Indian tribal governments with the interest of State governments in determining the best interests of Indian children. The ICWA recognizes the exclusive jurisdiction of tribal courts for proceedings involving an Indian child who resides or is domiciled on Indian lands. For other proceedings involving Indian children, the ICWA provides for concurrent jurisdiction with tribal and State courts. In these proceedings, ICWA creates a statutory presumption that the tribal court will have jurisdiction over matters involving Indian children. This jurisdictional framework was favorably described in the majority opinion of the U.S. Supreme Court in *Mississippi Band of Choctaw Indians* v. *Holyfield:*

> At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings. Section 1911 lays out a dual jurisdictional scheme. Section 1911(a)

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[1] H. Rept. 95–1386, 2d Session, 1978, at page 9.
[2] H. Rept. 95–1386, 2d Session, 1978, at page 9.
[3] Id. at page 9.
[4] Hearings on Indian Child Welfare before the Senate Subcommittee on Indian Affairs. 95th Cong., 1st Session (1977).

> establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child "who resides or is domiciled within the reservation of such tribe," as well as for wards of tribal courts regardless of domicile. Section 1911(b), on the other hand, creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state-court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.[5]

Founded on the assumption that the most basic trust responsibility of the Federal government is to provide protection and assistance to Indian children, Indian families and Indian tribes, the ICWA recognizes that the most appropriate means of providing that protection and assistance is through the Indian tribe itself. Well-settled principles of federal law establish that the primary authority in matters involving the relationship of an Indian child to his or her parents or extended family should be the Indian child's tribe. The Supreme Court in *Holyfield* recognized this principle.

> Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA. Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in federal and state courts.[6]

The Act also establishes other procedural safeguards for Indian child custody proceedings that include requirements concerning notice and appointment of counsel, parental and tribal rights of intervention, and procedures governing voluntary consent to termination of parental rights. Finally, the Act requires that tribal court decisions on child custody matters shall be accorded full faith and credit.

In creating these procedural safeguards, the language of the statute makes it demonstrably clear that the Congress sought to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." [7]

In the eighteen years since the ICWA was enacted, comprehensive, up-to-date and accurate statistical information on the placement of Indian children under the ICWA is essentially not available. A nationwide survey conducted in 1988 found that the rate of Indian children in out-of-home placements as compared to non-Indian children remained disproportionately high.[8] The authors of this report indicated that ten years after passage of the ICWA, Indian children continued to be placed in substitute care at a rate 3.6

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[5] *Mississippi Band of Choctaw Indians* v. *Holyfield,* 490 U.S. 30, 36 (1989).
[6] *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 US 30 (1989) at 42.
[7] 25 U.S.C. § 1902.
[8] Margaret Plantz, et al., "Indian Child Welfare: A Status Report" (1988).

times greater than the rate for non-Indian children.[9] Although many things influence such statistics, the authors found a primary factor to be that implementation of the ICWA has been uneven and that often the Act has been ignored by State and private agencies.[10] The report concluded that despite these discouraging findings, where the ICWA has been implemented and honored, there has been measurable progress. For example, there was a decline in public agency placements despite an increase in out-of-home placements for Indian children overall."[11] The majority of these placements took place in tribally-operated child welfare programs, which would indicate that Indian tribal governments were taking a more active role in providing child welfare services to their members.

TITLE III OF H.R. 3286

Title III of H.R. 3286 amends Title I of the Indian Child Welfare Act of 1978 by creating several new sections to the Act. Section 301 of H.R. 3286 would exempt from the application of the ICWA all custody proceedings involving a child who is not a resident of or domiciles on an Indian reservation and whose biological parents if "of Indian descent" and does not maintain "significant social, cultural or political affiliation" with his or her Indian tribe. This section provides that a State court would make the determination that an Indian parent does or does not maintain significant social, cultural, or political affiliations with his or her Indian tribe. Finally, section 301 provides that a State court's determination that the ICWA does not apply because an Indian parent has failed to maintain "significant social, cultural, or political affiliations" with his or her tribe would be a "final" determination which would not be reviewable by appellate courts.

Only parents and children who are eligible to be members of a Federally-recognized Indian tribe are not covered by the ICWA procedures. The U.S. Supreme Court has long recognized that tribal membership is a political rather than a racial classification. Section 301 would change the definition of an Indian under the ICWA from a political classification to a racial one and require a determination that a biological parent sufficiently maintain personal ties with his or her Indian tribe. Such a change could have the effect of expanding the definition of those individuals covered by the ICWA to all persons claiming Indian descent, regardless of whether there is an Indian tribe which would deem them eligible for membership. By shifting the application of the ICWA to persons of Indian descent, this section could render the ICWA vulnerable to legal challenge as furthering a constitutionally-impermissible racial classification.

A fundamental precept, unchanged since the inception of Federal-Indian law and reaffirmed by the U.S. Supreme Court in *Santa Clara Pueblo* v. *Martinez,*[12] is that Indian tribal governments have the exclusive authority to determine membership criterion under tribal laws and constitutions. These determinations of tribal membership are considered to be the most basic exercise of tribal sovereignty and self-governance. Section 301 would take this

[9] Id. at page 9–1.
[10] Id. at page ES–8.
[11] Id. at page ES–9.
[12] *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978).

fundamental power away from Indian tribes and give it to State courts, vesting in the State judiciary the power to decide whether a person is of Indian descent and if so, whether that person maintains "significant social, cultural, or political affiliation" with an Indian tribe. State courts are poorly equipped to make fundamental determinations of tribal membership and tribal affiliations.

Under section 301, a State court making tribal affiliation determinations would be exempted from any requirement to notify an Indian child's biological family or tribe of the pending determination. The ICWA now requires prior notice by a State court to an Indian child's biological family and tribe before making custody determinations in certain cases. Section 301 would authorize a State court to make a determination on the Indian status of the child without any prior notice to interested members of the child's biological family or tribe, and thereafter exempt the child's case from all remaining notice and participatory requirements of the ICWA.

The application of the ICWA under current law is premised on a child's eligibility for political membership in a Federally-recognized Indian tribe. Tribal membership can be renounced, but each Indian tribe's membership criteria and enrollment procedures are different, as is the manner in which those actions are documented. In some cases, a tribal roll is used. In others, a voting list is used that is limited to those persons of majority age. Still other tribal constitutions limit formal membership to those residing on a reservation or within the boundaries of a Native village, treating those who migrate for work or school as "eligible" to assume membership upon their return. Section 301 proposes to empower a State court to decide whether a parent is an Indian at the time of the child custody proceeding. Under the procedures set out in Section 301, an Indian would be found to have no tribal affiliation at the time of inception of the custody proceeding even though he or she was born and raised within an Indian community, was enrolled as a member, but then moved to go to college and thus under the tribal constitution was no longer on the roll but merely "eligible" to be an enrolled member upon his or her return.

Finally, section 301 seeks to make a State court's decision on the applicability of the Indian Child Welfare Act non-reviewable by appellate courts. Under the process set out in this section, a State court is not required to provide any notice to an Indian child's biological family or Indian tribe in making a determination of whether an individual is "of Indian descent" and has maintained sufficient affiliation with the tribe. Therefore, a State court could move with dispatch in a summary *ex parte* proceeding early in a case involving an Indian child and then have its determination be immune from appeal if an Indian biological family or tribe later learn of the custody proceeding after the Indian status determination has been made.

Section 302 of H.R. 3286 would amend Title I of the Indian Child Welfare Act by creating a new section 115. Section 302 declares that, as a matter of Federal law, anyone 18 years or older who is not a member of an Indian tribe "may become a member of an Indian tribe only upon the person's written consent." This provision is not limited to the context of Indian child welfare proceedings but could apply to all applications of tribal membership in Federal law.

This section would also authorize a State court to determine what is a biological parent's "actual date of admission to membership in the Indian tribe" and declare that tribal's membership "shall not be given retroactive effect." Under this provision, the fundamental authority to determine individual membership is an Indian tribe would be vested in the State judiciary, severely undermining longstanding principles of Federal Indian law and tribal self-government.

Further, these provisions would place a substantial, unfunded Federal mandate upon Indian tribes to maintain evidence of each member's written consent to membership. Failure to maintain such files would cause, when combined with the other provisions of this Title, a significant loss of tribal rights and privileges. While these provisions appear to seek to make tribal membership voluntary, tribal membership is already voluntary in every instance since under tribal law membership can be renounced by an Indian of majority age. Renouncing of one's tribal membership is typically done in instances when an Indian is eligible for membership in more than one tribe, but is required by a particular tribe's law to hold membership in no other tribe.

Finally, Section 303 of H.R. 3286 provides that the amendments made by this Title would take effect upon enactment and apply to any child custody proceeding in which a final decree has not been entered as of the date of enactment. This amendment would apply new rules to a number of child custody cases already under review by the courts. Authorizing the retroactive application by a court of a newly-legislated change of law can disrupt judicial economy and encourage litigants to delay court proceedings while they seek private relief from the Congress rather than pursue relief in the courts.

In sum, the amendments to the ICWA proposed by Title III would seriously undermine longstanding principles of Federal Indian law and result in a significant erosion of tribal sovereignty. If enacted, fundamental determinations of tribal membership would be transferred to an ill-equipped State judiciary for a final, non-reviewable determination. Such a process conflicts with the Congress' longstanding commitments to tribal self-governance and tribal self-determination. In addition, the Committee is very troubled by several serious procedural due process and constitutional questions which are raised by these proposed amendments. For these reasons, the Committee voted to strike Title III in its entirety from H.R. 3286 and report H.R. 3286, as amended, to the full Senate with the recommendation that it be passed without any amendments to the Indian Child Welfare Act of 1978.

## LEGISLATIVE HISTORY

H.R. 3286 was introduced by Representative Molinari on April 23, 1996 in the House of Representatives and was referred to the Committee on Ways and Means, the Committee on Resources, and the Committee on Economic and Educational Opportunities. The bill was favorably reported by the Committee on Resources with an amendment on April 30, 1996. On April 30, 1996, the Committee on Economic and Educational Opportunities was discharged of the bill and on May 3, 1996, the Committee on Ways and Means favor-

ably reported the bill with an amendment. H.R. 3286 was passed by the House of Representatives on May 10, 1996.

In the Senate, the bill was referred to the Committee on Finance on May 13, 1996. On May 23, 1996 pursuant to a unanimous consent agreement, Titles I, II and IV of H.R. 3286 were referred to the Committee on Finance and Title III of H.R. 3286 was referred to the Committee on Indian Affairs for a period of ten (10) days of session after the Committee on Finance has reported the bill. On June 12, 1996, the Committee on Finance favorably reported H.R. 3286, with amendments to Titles, I, II, and IV. On June 19, 1996, the Committee on Indian Affairs, by a vote of 14 for, and 1 against, favorably reported H.R. 3286 with an amendment.

## COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on June 19, 1996, the Committee on Indian Affairs, by a vote of 14 for, and 1 against, ordered the bill reported with an amendment, with the recommendation that the Senate pass the bill as reported.

## SECTION BY SECTION ANALYSIS

The Committee on Indian Affairs struck all of the provisions in Title III of H.R. 3286.

## COST AND BUDGETARY CONSIDERATIONS

The cost estimate for Title III of H.R. 3286 as amended, as calculated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, June 20, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared a cost estimate for Title III of H.R. 3286, the Adoption Promotion and Stability Act of 1996, as ordered reported by the Senate Committee on Indian Affairs on June 19, 1996.

The committee adopted an amendment that would strike Title III of H.R. 3286. Therefore CBO estimates that Title III of H.R. 3286, as ordered reported by the Committee on Indian Affairs, would have no federal budgetary effects.

Since enactment would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this title of the bill. Title III of H.R. 3286, as ordered reported, contains no mandates as defined in Public Law 104–4 and would impose no direct costs on state, local or tribal governments, or the private sector.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
(For June E. O'Neill, *Director*).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. the Committee believes that striking Title III of H.R. 3286 will create no regulatory or paperwork impacts.

EXECUTIVE COMMUNICATIONS

The Committee received the following executive communications from the Honorable Bruce Babbitt, Secretary of the Interior, U.S. Department of the Interior, and Mr. Andrew Fois, Assistant Attorney General, U.S. Department of Justice regarding Title III or H.R. 3286:

THE SECRETARY OF THE INTERIOR,
*Washington, June 18, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,*
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: In a letter to the Speaker, the President has stated his strong support for H.R. 3286 and its purpose of encouraging the adoption of children. However, in our role as trustee for Indians and Indian tribal governments, we would have serious concerns if an amendment were offered to H.R. 3286 for the purpose of amending the Indian Child Welfare Act of 1978 (Public Law 95–608). These concerns are addressed below.

The United States has a government-to-government relationship with Indian tribal governments. Protection of their sovereign status, including preservation of tribal identity and the determination of Indian tribal membership, is fundamental to this relationship. The Congress, after ten years of study, passed the Indian Child Welfare Act (ICWA) of 1978 (P.L. 95–608) as a means to remedy the many years of widespread separation of Indian children and families. The ICWA established a successful dual system that establishes exclusive tribal jurisdiction over Indian Child Welfare cases arising in Indian country, and presumes tribal jurisdiction in other cases involving Indian children, yet allows concurrent state jurisdiction in Indian child adoption and custody proceedings where good cause exists. This system, which authorizes tribal involvement and referral to tribal courts, has been successful in protecting the interests of Indian tribal governments, Indian children, and Indian families.

The ICWA amendments proposed in Title III of H.R. 3286, as introduced, would effectively dismantle this carefully crafted system by allowing state courts, instead of tribal courts with their specialized expertise, to make final judgments on behalf of tribal members. Such decisions would adversely affect tribal sovereignty over tribal members as envisioned by the ICWA and successfully implemented for the past 18 years.

We therefore urge the committee to disallow the reintroduction of Title III into this bill.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

BRUCE BABBITT.

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U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, June 18, 1996.*

Hon. JOHN MCCAIN,
*Chairman, Senate Committee on Indian Affairs,*
*Washington, DC.*

DEAR MR. CHAIRMAN: This letter presents the views of the Justice Department on H.R. 3286, the "Adoption Promotion and Stability Act of 1996." We strongly support H.R. 3286 without the inclusion of title III. We also recommend that title II be modified to addressed the concerns below.

*Title II*

Section 201(a) of H.R. 3286 would allow any person denied the opportunity to be an adoptive or foster parent on the basis of race, color or national origin by a State, or any person aggrieved by a State's discrimination in making a placement decision in violation of the Act to sue the State in Federal court. To ensure that the immunity from suit granted States by the Eleventh Amendment does not prevent individuals from vindicating this right, we suggest that the bill include a provision clarifying that section 201 is enacted pursuant both to Congress' authority under section 5 of the Fourteenth Amendment and to its spending power under article I of the Constitution. Alternatively section 201 could be modified to expressly require a State to waive its Eleventh Amendment immunity from suits brought pursuant to H.R. 3286, as a condition of receiving Federal payments for foster care and adoption assistance.

*Title III*

*A. Detrimental impact on tribal sovereignty*

The proposed amendments interfere with tribal sovereignty and the right of tribal self-government. Among the attributes of Indian tribal sovereignty recognized by the Supreme Court, is the right to determine tribal membership. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978). Section 302 of H.R. 3286 provides that membership in a tribe is effective from the actual date of admission and that it shall not be given retroactive effect. For persons over 18 years of age, section 302 requires written consent for tribal membership. Many tribes do not regard tribal enrollment as coterminous with membership and the Department of Interior, in its guidelines on Indian child custody proceedings, has recognized that "[e]nrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative."[1] Through its membership restrictions, H.R. 3286 may force some

[1] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,586 (Nov. 6, 1979).

tribal governments to alter enrollment and membership practices in order to preserve the application of the Indian Child Welfare Act (ICWA), 25 U.S.C. 1901 et seq., to their members.

*B. Detrimental impact on tribal court jurisdiction*

H.R. 3286 would amend the ICWA to require a factural determination of whether an Indian parent maintains the requisite "significant social, cultural, or political affiliation" with a tribe to warrant the application of the Act. Title III fails to indicate which courts would have jurisdiction to conduct a factual determination into tribal affiliation. To the extent that State courts would make these determinations, H.R. 3286 would undercut tribal court jurisdiction, and essential aspect of tribal sovereignty. See *Iowa Mutual Ins. Co.* v. *La Plante,* 480 U.S. 9, 18 (1987). Reducing tribal court jurisdiction over Indian Child Welfare Act proceedings would conflict directly with the objectives of the ICWA and with prevailing law and policy regarding tribal courts.

The President, in his Memorandum on Government-to-Government Relations with Native American Tribal Governments (April 29, 1994), directed that tribal sovereignty be respected and tribal governments consulted to the greatest extent possible. Congress has found that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments, "See Indian Tribal Justice Act, 25 U.S.C. 3601(5). Retaining ICWA's regime of presumptive tribal jurisdiction crucial to maintaining harmonious relations with tribal governments, to ensuring that the tribes retain essential features of sovereignty and to guarding against the dangers that Congress identified when it enacted ICWA in 1978.

Thank you for the opportunity to comment on this matter. If we may be of additional assistance, please do not hesitate to call upon us. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

ANN M. HARKISS,
(For Andrew Fois, Assistant Attorney General).

CHANGES IN EXISTING LAW

The Committee's action to strike Title III of H.R. 3286 will result in no changes in existing law.

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